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Before the

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**FEDERAL COMMUNICATIONS COMMISSION RECEIVED**  
Washington, D.C. 20554

**FEB 22 1993**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Application of Open Network ) CC Docket No. 92-256  
Architecture and Nondiscrimination )  
Safeguards to GTE Corporation )

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

**I. INTRODUCTION**

Under Paragraphs V(D)(1) and V(D)(2) of a Consent Decree issued in 1984, General Telephone Operating Companies ("GTOCs" or "GTE") have been allowed to provide information services only through separate subsidiaries.<sup>1/</sup> The separation requirement is contingent on continuation of the information services restriction on the Bell Operating Companies ("BOCs") contained in the Modified Final Judgment ("MFJ") in the breakup of the Bell System.<sup>2/</sup> Paragraph V(D)(3) of the Decree calls for expiration of the separate subsidiary requirement

whenever and to the extent that a BOC is relieved of the provisions of Section II(D) of the Modified Final Judgment . . . , either (i) throughout a state, in which case the limitations of Paragraphs V(D)(1) and V(D)(2) shall not apply to the information services of a GTOC within that state, or (ii) in any BOC exchange area, in which case the

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<sup>1/</sup> *United States v. GTE Corporation*, 1985-1 Trade Cas. (CCH) ¶ 66,355 (D.D.C. 1984) ("Consent Decree"). See also *United States v. GTE Corporation*, 603 F. Supp. 730 (D.D.C. 1984).

<sup>2/</sup> *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

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limitations of Paragraphs V(D)(1) and V(D)(2) shall not apply to the information services of a GTOC within any GTOC exchange or serving area if telecommunications between such GTOC exchange or serving area and such BOC exchange area are not interexchange telecommunications.

The information services restriction on the BOCs was lifted on July 25, 1991, but is under appeal.<sup>3/</sup> Thus, GTE may seek removal of the separate subsidiary requirement under Paragraph V(D)(3)(b) of the Consent Decree.

The Commission is now considering imposing on GTE the same open network architecture ("ONA") and nondiscrimination requirements which apply to the BOCs in the provision of enhanced services.<sup>4/</sup> In the *Notice*, the Commission reaches the tentative conclusion that applying ONA to GTE would serve the public interest,<sup>5/</sup> and seeks comment on various aspects of implementation.

The National Association of Broadcasters ("NAB")<sup>6/</sup> agrees that there should be restrictions on GTE's enhanced services operations similar to those on the BOCs. However, because several court proceedings in progress could affect the Commission's ability to act in this area, NAB believes it would be erroneous for the

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<sup>3/</sup> *United States v. Western Electric Company*, 767 F. Supp. 308 (D.D.C. 1991), *appeal docketed*, No. 91-5263, *et al.* (D.C. Cir. Aug. 30, 1991).

<sup>4/</sup> *Notice of Proposed Rule Making* ("Notice") in CC Docket No. 92-256, 7 FCC Rcd. 8664 (1992). The Chief of the Common Carrier Bureau's Policy and Program Planning Division subsequently extended the time for filing comments and reply comments to February 22, 1993, and March 24, 1993, respectively. *See Order*, DA 93-89, released January 27, 1993.

<sup>5/</sup> *Id.* at 7 ¶ 6.

<sup>6/</sup> NAB is a nonprofit, incorporated association which serves and represents America's radio and television broadcast stations and networks. Many of NAB's members provide information services which will be affected by the outcome of this proceeding.

Commission to assume that the Decree's separation requirements are no longer in effect. Therefore, NAB urges the Commission to retain the separate subsidiary and nondiscrimination requirements imposed on GTE by the Consent Decree at least until the court proceedings have been concluded. In the interim, the Commission should make ONA automatically applicable to GTE-provided enhanced and information services were the Decree to be clearly no longer in effect.

## **II. GTE MUST HAVE AT LEAST THE SAME ACCESS AND NONDISCRIMINATION REQUIREMENTS AS THE BOCS.**

NAB agrees with the Commission's assessment that safeguards must be imposed on GTE. The *Notice* concludes that GTE is of sufficient size to warrant application of ONA and nondiscrimination safeguards.<sup>7/</sup> GTE ranks higher than most BOCs in number of exchanges, total operating revenue, total gross plant, number of employees and number of access lines.<sup>8/</sup>

Of equal importance to GTE's size is the fact that, under the Consent Decree, GTE has been allowed to provide information services through a separate subsidiary for eight years. Unlike the BOCs, who were barred by the MFJ from legally providing most information services, GTE is already active in the information services area. Thus, GTE has adequate incentive to discriminate against competing enhanced and information services providers.

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<sup>7/</sup> See *Notice*, *supra* note 4, at 8668 ¶ 12.

<sup>8/</sup> *Id.* at 8667 n.27.

In approving the Consent Decree, the court examined many of the same factors (e.g., sparsity of population served by GTE, lesser dominance than BOCs in their service regions) which the Commission has considered in this proceeding.<sup>9/</sup> The court concluded that safeguards are necessary to promote competition.

In fact, because technology-advanced information services, which are expected eventually to be among the most profitable aspects of the telecommunications industry, are only beginning to be marketed commercially on a significant scale, their provision by a local exchange monopolist poses perhaps an even greater threat to competition than does a monopolist's participation in the interexchange market. As the Court stated in *AT&T*, if the Operating Companies were excluded from the information services market,

[T]hey will have an incentive, as time goes on, to design their local networks to accommodate the maximum number of information services providers, since the greater the number of carriers the greater will be the Operating Companies' earnings from access fees. Thus, competition will be encouraged from the outset. If, however, the Operating Companies were permitted to provide their own information services, their incentives would be the precise opposite: it would be to design their local networks to discourage competitors, and thus to thwart the development of a healthy, competitive market.<sup>10/</sup>

GTE's acquisition of Contel exacerbates the problem, as recognized in the *Notice*.

The increased scope of GTE's operations and its increased financial strength enhances GTE's ability to participate in the enhanced services market and its ability and incentive to discriminate against competitors. Application of nondiscrimination safeguards to GTE will effectively guard against such discriminatory actions.<sup>11/</sup>

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<sup>9/</sup> Compare 603 F. Supp. at 733-34 with *Notice*, *supra* note 4, at 8667 ¶¶ 8-10.

<sup>10/</sup> 603 F. Supp. at 741 (citing *United States v. AT&T*, 552 F. Supp. 131, 189-90 (D.D.C. 1982) (footnotes omitted)).

<sup>11/</sup> *Notice*, *supra* note 4, at 8667 ¶ 8.

GTE's size and incentives to discriminate against competitors are comparable to the BOCs. The Commission's treatment of GTE should therefore be similar to its treatment of the BOCs.

**III. THE COMMISSION SHOULD RETAIN THE SEPARATE SUBSIDIARY REQUIREMENT FOR GTE UNTIL THERE IS A CLEARER INDICATION THAT THE DECREE IS NO LONGER IN EFFECT.**

The Consent Decree contains a provision which removes the separate subsidiary requirement whenever and wherever the BOCs are allowed into information services. Because the restriction on BOC-provided information services is not currently in effect, and the court has subsequently removed the separate subsidiary requirement for GTE-provide information services in Alaska and Hawaii,<sup>12/</sup> the Commission concludes that the separation requirement has been lifted for all GTE information services.<sup>13/</sup> The Commission seeks comment on its analysis.

For a variety of reasons, NAB believes that the Commission analysis is faulty, and therefore the separate subsidiary requirement for GTE-provided information services should be retained. First, it is not clear that the Consent Decree's separation requirement no longer applies to GTE. The order lifting the requirement for GTE's Alaska and Hawaii operations was granted four months *after* the same court decided it was compelled to lift the information services restriction on the BOCs. Had the court considered Paragraph V(D)(2) of the Decree to be no

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<sup>12/</sup> *United States v. GTE Corp.*, No. 83-1298-HHG (D.D.C. Nov. 27, 1991).

<sup>13/</sup> *Notice, supra* note 4, at 8666 n.23.

longer applicable, it likely would have dismissed GTE's motion as moot or even extended the effect of the motion to all information services provided by GTE. It did not. In fact, the court added a proviso which would revoke or modify its Alaska-Hawaii order in the event the court's lifting of the restrictions on the BOCs is reversed or modified on appeal. Thus, the court has been cautious in allowing GTE freedom from the separation requirement. The Commission, therefore, should proceed cautiously as well, and not assume that GTE is no longer bound by the court-ordered separate subsidiary requirement.

Second, the court decision which removed the information services restrictions on the BOCs is on appeal.<sup>14/</sup> A reversal of the decision would mean retention of the separation requirements for all GTE-provided information services, including those in Alaska and Hawaii. Were the Commission to implement ONA requirements before resolution of the appeal, it may later be forced to remove them, as ONA is intended as a replacement for separation requirements.<sup>15/</sup> The Commission therefore should not completely eliminate the separation requirements for GTE until the appeal process is completed.

Third, even if the separation requirements were lifted for all GTE information services, the Commission must consider the uncertain status of the application of ONA to the BOCs. The *Computer III* decision is still being reviewed

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<sup>14/</sup> The BOCs, therefore, have entered the information services market at their own risk.

<sup>15/</sup> See *Third Computer Inquiry*, 104 F.C.C.2d 958, 963 (1986) (Report and Order) ("*Computer III*").

by the courts.<sup>16/</sup> Until the review process is completed, application of ONA to BOC-provided enhanced and information services is problematic. And because of the many similarities between GTE and the individual BOCs, the court review of *Computer III* would likely affect application of ONA to GTE.

NAB therefore believes it is premature for the Commission to apply only ONA to GTE until the District Court has confirmed that the Consent Decree is no longer applicable to GTE's information services operations *and* the courts have completed the appeal of the lifting of the information services restriction on the BOCs and the review of *Computer III*. NAB urges the Commission to retain the separate subsidiary requirement for GTE-provided information services, with an eye toward ONA implementation at such time as the Decree's separation requirements have clearly been lifted.

#### IV. CONCLUSION

The Commission is correct in proposing to apply safeguards on GTE-provided information services. However, because the status of the Consent Decree is unclear and implementation of ONA on GTE is dependent on the outcome of several court proceedings which are in progress, NAB believes it would be premature for the Commission to remove the separation requirements from GTE-provided information services at this time. Instead, NAB urges the Commission to retain the separate subsidiary requirements placed on GTE by the Consent Decree until the

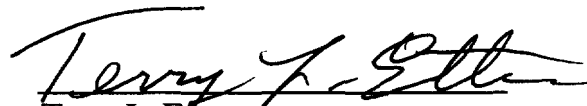
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<sup>16/</sup> *People of the State of California v. FCC*, No. 90-70336 (9th Cir. filed July 5, 1990).

Decree's restrictions are clearly no longer in effect. ONA can be made automatically effective at that time.

Respectfully submitted,

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